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### **JURISDICTIONAL STATEMENT**

Respondents Wayman Smith, III, et al, concur that jurisdiction is proper in this Court pursuant to Mo. Const. Art. V, §3.

## **STATEMENT OF FACTS**

Respondents Wayman Smith, III, et al., accept Appellants' Statement of Facts.

**POINTS RELIED ON**

**I**

**THE TRIAL COURT DID NOT ERR IN RENDERING ITS JUDGMENT  
THAT THE STATE LEGAL EXPENSE FUND STATUTE, SECTION 105.711  
R.S.MO. ET SEQ. APPLIED TO THE BOARD OF POLICE  
COMMISSIONERS OF THE CITY OF ST. LOUIS AND ITS EMPLOYEES  
BECAUSE (1) THE BOARD OF POLICE COMMISSIONERS HAS BEEN  
DECLARED BY THE SUPREME COURT TO BE A STATE AGENCY; (2)  
INDIVIDUAL POLICE OFFICERS EMPLOYED BY THE BOARD OF  
POLICE COMMISSIONERS ARE DECLARED BY STATUTE, SECTION  
84.330 R S.MO., TO BE OFFICERS OF THE STATE; AND (3) INDIVIDUAL  
POLICE OFFICERS ARE EMPLOYEES OF A STATE AGENCY, I.E., THE  
BOARD OF POLICE COMMISSIONERS.**

STATE EX REL. SAYAD V. ZYCH, 642 S.W.2D 907 (MO. BANC 1982)

STATE EX REL. ST. LOUIS POLICE COMMISSIONERS V. ST. LOUIS COUNTY  
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STATE EX REL HAWES V. MASON, 54 S.W. 524 (MO. 1899)

O'Neil v. State, 662 S.W.2d 260 (Mo. banc 1983)

State ex rel. Sanders v. Cervantes, 480 S.W.2d 888 (Mo. banc 1972)

Slater v. City of St. Louis, 548 S.W.2d 590 (Mo. App. E.D. 1977)

## II

**THE TRIAL COURT DID NOT ERR IN RENDERING JUDGMENT  
AWARDING PLAINTIFFS AMOUNTS EXPENDED TO PAY JUDGMENTS  
RENDERED AND TO PROVIDE A DEFENSE TO THE ACTIONS ATTACHED  
AS EXHIBITS TO PLAINTIFFS' PETITION BECAUSE THE STATE WAS  
NOT SHIELDED FROM LIABILITY UNDER THE DOCTRINE OF  
SOVEREIGN IMMUNITY IN THAT (1) THE ACTION BELOW WAS NOT A  
TORT CLAIM TO WHICH SOVEREIGN IMMUNITY WOULD APPLY AND  
(2) THE LEGAL EXPENSE FUND STATUTE CONSTITUTES A WAIVER OF  
ANY SUCH SOVEREIGN IMMUNITY.**

DIXON V. HOLDEN, 923 S.W.2D 370 (MO. APP. W.D. 1996)

PALO V. STANGLER, 943 S.W.2D 683 (MO. APP. E.D. 1997)

V.S. DiCarlo Construction v. State, 485 S.W.2d 52 (Mo. 1972)

Crain v. Mo. State Employees Retirement System, 613 S.W.2d 912

(Mo. App. W.D. 1981)

## **ARGUMENT**

### **Introduction**

Appellants appeal from the judgment of the trial court granting summary judgment in favor of plaintiffs on their request for declaratory judgment that they are covered by the State Legal Expense Fund Statute and awarding them the sum of \$35,065.35 as reimbursement for amounts expended for the defense and payment of awards and settlements in a number of lawsuits filed against the plaintiff Board of Police Commissioners and various officers employed by the Board. The standard of review of a decision granting summary judgment is essentially de novo, with the reviewing court employing the same criteria as the trial court in ruling on the motion initially. ITT Commercial Finance Corporation v. Mid-America Marine Supply Corporation, 854 S.W.2d 371, 376 (Mo. banc 1993). This Court reviews the record in the light most favorable to the party against whom summary judgment was entered, giving that party the benefit of all reasonable inferences from the record. Id.

In this case, there are no material issues in dispute. The basic question, which is one of law, is: does the State Legal Expense Fund provide coverage to the Board of Police Commissioners of the City of St. Louis and its employee police officers?



# **I**

**THE TRIAL COURT DID NOT ERR IN RENDERING ITS JUDGMENT THAT THE STATE LEGAL EXPENSE FUND STATUTE, SECTION 105.711 R.S.MO. ET SEQ. APPLIED TO THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF ST. LOUIS AND ITS EMPLOYEES BECAUSE (1) THE BOARD OF POLICE COMMISSIONERS HAS BEEN DECLARED BY THE SUPREME COURT TO BE A STATE AGENCY; (2) INDIVIDUAL POLICE OFFICERS EMPLOYED BY THE BOARD OF POLICE COMMISSIONERS ARE DECLARED BY STATUTE, SECTION 84.330 R S.MO., TO BE OFFICERS OF THE STATE; AND (3) INDIVIDUAL POLICE OFFICERS ARE EMPLOYEES OF A STATE AGENCY, I.E., THE BOARD OF POLICE COMMISSIONERS.**

Appellants begin the argument portion of their brief reciting a number of cannons of statutory construction, and then proceed to an exhaustive discussion of statutory history leading up to the enactment of the current version of the Legal Expense Fund Statute, §105.711 R.S.Mo. Noticeably absent from appellants' discussion is any reference to the cardinal rule of statutory interpretation which should guide court's in determining the intent of the Legislature in enacting statutes: "[t]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to **consider the words used in their plain and ordinary meaning.**" Wolff Shoe

Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988)(emphasis added).

Throughout their brief, appellants contend that the State Legal Expense Fund is available to provide a defense and indemnify only those individuals who are paid by the State of Missouri. Appellants consistently mis-cite Cates v. Webster, 727 S.W.2d 901 (Mo. banc 1987) as supporting this proposition. Cates v. Webster does not stand for any such proposition. It does not stand for such a proposition because the argument that the State Legal Expense Fund provides coverage only to those who are paid directly by the State is simply nonsense. The statute in plain and unambiguous terms provides coverage to whole classes of individuals who are clearly not paid by the State. See §105.711.2(3)(b) R.S.Mo. Supp. (physicians employed by or under contract with a city or county health department); §105.711.2(3)(c) R.S.Mo. Supp. (physicians employed by or under contract with a federally funded community health center); §105.711.2(3)(d) R.S.Mo. Supp. (physicians, nurses, physicians assistants, dental hygienists or dentists who provide services at a city or county health department or nonprofit community health center); §105.711.2(3)(e) R.S.Mo. Supp. (physicians, nurses, physicians assistants, dental hygienists or dentists who provide services to students at public, private or parochial elementary or secondary schools); §105.711.2(4) R.S.Mo. Supp.(staff employed by the juvenile division of a circuit court.) None of these classes of individuals are paid by the State, yet the State Legal Expense Fund statute applies to all of them.

The Tort Defense Fund, §105.710 R.S.Mo. (1978), made coverage under that statute “part of the compensation to be paid” to state officers covered thereby. It is noteworthy that similar language is absent in the current State Legal Expense Fund statute. Presumably, this change in statutory language was intended to affect a substantive change. Cf. O’Neil v. State, 662 S.W.2d 260, 262 (Mo. banc 1983)(Court should interpret amended statute on assumption that legislature intended change in the law.) Clearly such a change was intended. Coverage under the State Legal Expense Fund statute is no longer intended to be **part of** compensation because the State Legal Expense Fund statute expressly extends coverage to classes of individuals who are clearly not compensated by the State at all.

There is yet another reason why appellants’ reliance upon Cates v. Webster is misplaced. Cates v. Webster dealt specifically with the issue of judicial employees’ coverage under the State Legal Expense Fund statute. See Cates v. Webster, 727 S.W.2d at 905 wherein the Court referred to the distinction between state and non-state employees “within the judicial system” and noted that when “determining whether appellant is an employee of the state or agency thereof, it is significant that elsewhere the legislature has made the designation of certain judicial personnel as state employees dependent upon their being paid by the state.” In Cates, the Court relied upon other statutes dealing with judicial employees in answering the above question since the legislature did not define the term “employee of the state of

Missouri or any agency of the state” in §105.711.2(2) R.S.Mo. In fact §483.083 R.S.Mo. specifically states that the court administrator for Jackson County (the plaintiff’s employer in Cates) **was not** a state employee.

Appellants also contend that the statute affords coverage only to officials who have "statewide responsibilities." Brief of Appellants, p. 22. Nothing in the statute itself imposes such limitations. Under appellants' argument, all members of the judiciary (and their employees) other than members of the Supreme Court would not be covered because they do not have "statewide responsibilities." But we know that the Legal Expense Fund does in fact cover all judges even though they do not meet appellants' "statewide responsibilities" test. We know this because the Supreme Court has said so. See In re 1983 Budget for Circuit Court of St. Louis County, 665 S.W.2d 943, 945 (Mo banc 1984)("The [Legal Expense Fund] statute clearly encompasses the acts and decisions of judges arising from the performance of their official duties and responsibilities.").

Section 105.711.2 R.S.Mo. Supp. states the fund is to be used for the payment of any claim or any amount required by any final judgment rendered against, among others: (1) the state of Missouri, or any agency of the state, pursuant to section 537.600, R.S.Mo.; (2) any officer or employee of the state of Missouri or any agency of the state. On its face, this statute compels the State of Missouri to represent *any* state agency or officer of the state, not merely those that receive all of their funding or salary from the State Treasury.

## **The St. Louis Board of Police Commissioners Has Long Been Held To Be A State Agency**

Numerous cases decided over more than a century have expressly held, or clearly recognized, that the St. Louis Board of Police Commissioners is a state agency. Beginning shortly after the enactment of the original statutory scheme creating the current police department in St. Louis, see 1861 Mo.Laws 446, the Supreme Court addressed the status of this new entity: “the Police Commissioners are an agency of the State Government, and required to perform within a specified locality some of the most important duties of the government.” State ex rel. St. Louis Police Commissioners v. St. Louis County Court, 34 Mo. 546, 571 (1864). In State ex rel Hawes v. Mason, 54 S.W. 524, 529 (Mo. 1899), the Supreme Court observed that “it is almost universally conceded that police boards and metropolitan police forces are state officers, and fall clearly within legislative control.” See also, State ex rel Sanders v. Cervantes, 480 S.W.2d 888, 890-891 (Mo. banc 1972) (recognizing right to judicial review “of the acts of any public official or administrative agency of this state” in referring to St. Louis Police Board) and Slater v. City of St. Louis, 548 S.W.2d 590, 592-593 (Mo. App. 1977)(noting distinction between authority of St. Louis in matters of local concern, and the authority of the State to retain control over operation of the police department in St. Louis, deemed to be a matter of general State concern.) More recently in State ex rel Sayad v. Zych, 642 S.W.2d 907, 910 (Mo. banc 1982), the Supreme Court reaffirmed that

the St. Louis Police Board was a state agency for purposes of the State-mandates provision of the Hancock Amendment, Mo. Const. Art. X, §21: “[b]ecause the Police Board performs these state functions, it is a state agency for purposes of article X, section 21, of the Missouri Constitution.” All of these cases include one emphatic declaration: the St. Louis Police Board is a state agency. Not only do cases dealing with the St. Louis Police Board lead to the conclusion that it is a state, as opposed to a local or City agency, but the statutes governing the St. Louis Police Board clearly confirm this status. The members of the Police Board, other than the Mayor ex officio, are appointed by the Governor with the advice and consent of the Senate, and they receive their commissions from the Governor. §84.030 R.S.Mo. Cf. Mo. Const. Art. IV, §§5, 51.<sup>1</sup> If the Police Board is other than

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<sup>1</sup>Mo. Const. Art. IV, §5 provides:

The governor shall commission all officers unless otherwise provided by law. All commissions shall be issued in the name of the state, signed by the governor, sealed with the great seal of the state and attested by the secretary of state.

Mo. Const. Art. IV, §51 provides in part:

The appointment of all members of administrative boards and commissions and of all department and

a state agency, why does the Governor appoint its members with the advice and consent of the senate? It is also the Governor who is authorized by statute to remove any commissioner for misconduct in office. §84.080 R.S.Mo.

While appellants note that the salary of police officers is paid out of the City of St. Louis treasury, they neglect to point out that it is the State Legislature which establishes the qualifications of police officers, §84.120 R.S.Mo., the number of police officers of each rank the Police Board may employ, §84.150 R.S.Mo. and the maximum amount that officers of each rank can be paid. §84.160 R.S.Mo. The Police Board is required to make its records available for inspection by the General Assembly or any committee thereof. §84.250 R.S.Mo.

The statutes governing the police department in St. Louis also expressly prohibit the City of St. Louis and its officials from presuming to exercise any authority or control over the police department. Section 84.010 R.S.Mo. prohibits the City, its officers, or agents from interfering in any way with the Police Board, its officers or employees. Further, §84.220 R.S.Mo. provides that any such City

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division heads, as provided by law, shall be made by the governor. All members of administrative boards and commissions, all department and division heads and all other officials appointed by the governor shall be made only by and with the advice and consent of the senate.

officer or employee who should do so shall be subject to a fine of \$1,000.00 and shall forfeit his or her office or employment. All of these statutory provisions are consistent with the Police Board's status as a state agency and its employee police officers status as officers of the State. If this is not what the Police Board is, and the Board and police officers are, as appellant seems to argue, municipal officers and employees, then the State has another problem: the entire statutory scheme for the Metropolitan St. Louis Police Department would be invalid under Mo. Const. Art. VI, §22 ("No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous constitution..."). But this Court need not be concerned about that issue, because the statutes and existing case law clearly recognize that the Police Board is a state agency, and its officers are state officers.

Finally, it is noteworthy that the State Legal Expense Fund Statute was first enacted by the Legislature less than a year after the decision in Sayad v. Zych declaring the Police Board to be a state agency. See Laws, 1983, S.B 275. Faced with a nearly contemporaneous pronouncement that the Police Board was a state agency, the Legislature could have easily excepted this agency from the coverage of the State Legal Expense Fund if it had intended that the St. Louis Police Department not be covered by the statute. But it did not do so.

**Police Officers In St. Louis City Are Declared To Be State Officers**



Police officers employed by the St. Louis Police Board are specifically declared by statute to be officers of the state: “[t]he members of the police force of the cities covered by sections 84.010 to 84.340 . . . , are hereby declared to be officers of the said cities under the charter and ordinances thereof, **and also to be officers of the state of Missouri . . .**” Section 84.330 R.S.Mo. (emphasis added) Words used in a statute must be accorded their plain and ordinary meaning. State v. Burnau, 642 S.W.2d 621, 623 (Mo. banc 1982). Police officers in the City of St. Louis are officers of the state; the State Legal Expense Fund applies to officers of the state; hence, police officers in the City of St. Louis are covered by the State Legal Expense Fund.

Even without this express declaration that police officers in the City of St. Louis are officers of the state, it is clear that officers employed by the St. Louis Police Board would be covered by the State Legal Expense Fund. Since the St. Louis Police Board is, itself, a State agency as discussed above, coverage of the Fund extends to its officers and employees as well under §105.711.2(2) R.S.Mo. (providing coverage to “any officer or employee of the state of Missouri or any agency of the state . . .”) As employees of a state agency, police officers in the City of St. Louis are covered by the statute.

There are compelling reasons, aside from the plain reading of the statute, why the Police Board and police officers in the City of St. Louis should be covered by the State Legal Expense Fund. These officers are authorized by statute to make

arrests anywhere in the state, §84.090(10) R.S.Mo., and all courts of the state with jurisdiction over criminal matters are required to recognize them as officers of the state. §84.330 R.S.Mo. Thus, unlike officers in other municipalities, St. Louis police officers are authorized to perform police functions anywhere in the state. Under appellants' argument, such officers could be sued for actions taken outside of the City of St. Louis to enforce state statutes, but still not be covered by the State Legal Expense Fund statute. They take this position even though they also contend that the Legal Expense Fund applies only to officers or employees with "statewide responsibilities."

Second, although appellants point out that the City of St. Louis and/or the Board of Police Commissioners have **generally** historically indemnified officers for judgments rendered against them, they have not always done so, and there is no legal requirement that either of those entities do so. On the other hand, an officer of the state or an employee of a state agency is automatically covered under the State Legal Expense Fund statute for torts committed while in the scope of his or her duties.

Third, while appellants point out that the City Charter mandates that the City Counselor "shall render the police department all legal advice and services required by it", this does not mandate that the Police Board request representation by the City Counselor instead of the Attorney General under the State Legal Expense Fund statute, any more than a department of State Government is required to use its own

in-house counsel to defend tort claims instead of requiring the Attorney General to do so.<sup>2</sup> But aside from the representation issue, there is absolutely nothing in the City Charter or elsewhere (other than the State Legal Expense Fund) that provides a police officer in St. Louis with a source of funds out of which to pay a judgment rendered against him or her in an action arising out of the officer's official duties.

Under the plain terms of the statute, §105.711 R.S.Mo., the St. Louis Board of Police Commissioners and its officers are covered by the State Legal Expense Fund.

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<sup>2</sup>Appellants attempt to bootstrap their position by referring to the Attorney General's "consistent position" over 20 years that the Legal Expense Fund does not apply to the plaintiffs in this case. Until 1999, the Attorney General Office was apparently never asked to pass on this question. But regardless of what the Attorney General's opinion is, was, or might have been, it "can be entitled to no more weight 'than that given the opinion of any other competent attorney.'" State ex rel Stewart v. King, 562 S.W.2d 704, 709 (Mo. App. W.D. 1978), quoting Gershman Investment Corp. v. Danforth, 517 S.W.2d 33, 36 (Mo. banc 1974).

## **II**

**THE TRIAL COURT DID NOT ERR IN RENDERING JUDGMENT  
AWARDING PLAINTIFFS AMOUNTS EXPENDED TO PAY JUDGMENTS  
RENDERED AND TO PROVIDE A DEFENSE TO THE ACTIONS ATTACHED  
AS EXHIBITS TO PLAINTIFFS' PETITION BECAUSE THE STATE WAS  
NOT SHIELDED FROM LIABILITY UNDER THE DOCTRINE OF  
SOVEREIGN IMMUNITY IN THAT (1) THE ACTION BELOW WAS NOT A  
TORT CLAIM TO WHICH SOVEREIGN IMMUNITY WOULD APPLY AND  
(2) THE LEGAL EXPENSE FUND STATUTE CONSTITUTES A WAIVER OF  
ANY SUCH SOVEREIGN IMMUNITY.**

Appellants contend that the trial court improperly awarded a monetary judgment to plaintiffs because, according to appellants, the State is protected by sovereign immunity from such claims. According to appellants, the trial court should only have addressed the basic issue of whether the State Legal Expense Fund statute applies to the Board of Police Commissioners of the City of St. Louis and its officers. Once the trial court did so, appellants contend that plaintiffs should have been satisfied with this piric victory.

In Dixon v. Holden, 923 S.W.2d 370, 378-379 (Mo.App. W.D. 1996), this Court expressly rejected the argument that appellants make in this case. The Court was right to do so. Appellants' argument is that sovereign immunity is not just a defense to tort cases, but that it extends to all claims against the State. Thus except

for the statutory waiver found in §537.600 R.S.Mo., appellants argue that no monetary award can ever be recovered from the State. But that is not so. In addition to Dixon rejecting this view, the Eastern District has likewise held that actions other than tort claims are not barred by sovereign immunity. In Palo v. Stangler, 943 S.W.2d 683 (Mo. App. E.D. 1997) the plaintiff sought recovery of funds withheld by defendant officials of the Division of Child Support Enforcement. Like appellants in the present case, the Division in Palo v. Stangler argued that it was immune from suit because of sovereign immunity. The Court stated "[w]e agree with Division's assertion that sovereign immunity is a defense to a tort action against a governmental entity. The present action, however, is not an action in tort; and thus the doctrine of sovereign immunity is not applicable." 943 S.W.2d at 685.

Similarly, sovereign immunity is not a defense to an action based on contract, see, e.g., V.S. DiCarlo Construction Co. v. State, 485 S.W.2d 52 (Mo. 1972), or an action for benefits conferred by statute. See Crain v. Mo. State Employees Retirement System, 613 S.W.2d 912, 917 (Mo. App. W.D. 1981)("when a statute provides a benefit or awards a contract, the requisite waiver of immunity from suit to enforce the benefit or contract is inferred.")

Appellants cite Fort Zumwalt School District v. State, 896 S.W.2d 918 (Mo. banc 1995) in support of their blanket assertion that sovereign immunity protects the State from all claims other than those for which an express statutory waiver, such as §537.600 R.S.Mo., exists. But Fort Zumwalt does not say that. On the

contrary, the Court recognized that there may be instances where a cause of action must be inferred: [t]his Court will not infer or imply that a waiver of sovereign immunity extends to remedies that are not essential to enforce the right in question." 896 S.W.2d at 923. The Court went on to note that

"[o]ther equally effective but less onerous remedies than permitting a money judgment against the state are available to enforce a taxpayer's interests under Section 21. Specifically, a declaratory judgment relieving a local government of the duty to perform an inadequately funded required service or activity is an adequate remedy." Id.

Here, there is no similar remedy available. The trial court's judgment establishes that the plaintiffs had a right to have the Attorney General represent them in the underlying lawsuits and to be indemnified for any damages or settlements made as a result of those lawsuits. What good is that if the State never actually has to pay? Appellants' position is just that: no matter what the law says, we don't have to pay and you can't make us. That is not what this Court held in Dixon v. Holden.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the judgment below declaring that pursuant to the plain language of §105.711 R.S.Mo, the State Legal Expense Fund statute applies to the St. Louis Board of Police Commissioners and its officers and employees, that the Attorney General is required to defend said agency and officers and employees against covered tort claims, and that the Fund is

available and responsible to pay judgments rendered against said agency or its officers and employees as a result of any covered tort claim. Further, this Court should affirm the judgment awarding plaintiffs an amount to reimburse them for amounts expended in defense of claims that should have been covered by the State Legal Expense Fund.

Respectfully submitted,

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CITY COUNSELOR

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)**

The undersigned counsel of record hereby certifies that:

1. Counsel for Respondents is Edward J. Hanlon, MBE #26405, 314 City Hall, St. Louis, Mo. 63103, (314) 622-3361.
2. The Brief to which this certificate is attached complies with the limitations contained in Rule 84.06(b).
3. The Brief contains 4601 words in WordPerfect 8.0 format.

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Edward J. Hanlon #26405  
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St. Louis, Missouri 63103  
314-622-3361

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two (2) copies of the foregoing and a 3 ½" labeled diskette containing this brief and scanned for viruses, were served upon defendants-appellants by depositing same in the U.S. Mail, postage pre-paid addressed to Jeremiah W. (Jay) Nixon and Robert Presson, Attorney General's Office, Broadway Building, 6<sup>th</sup> Floor, P.O. Box 899, Jefferson City, Missouri 65102 this \_\_\_\_ day of July, 2003.